

Supreme Court, U. S.
F I L E D

SEP 2 1976

MICHAEL RODAK, JR., CLERK

**IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976**

No. 76-76-323

ALZALIA WINGATE and TONI WINGATE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

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v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Alzalia Wingate and Toni Wingate, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on June 16, 1976.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, which is unreported as of this date, and the order of that court denying the petition for the rehearing appear in the appendix to this petition. The District Court's memorandum opinion (unreported) and its order denying motion to vacate search warrant and return contents also appear in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1976. An order denying the petition for rehearing was entered on July 22, 1976. On August 16, 1976, an order was entered extending the time for filing a petition for writ of certiorari to September 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Was petitioners' property (some \$500,200 cash) seized by Federal agents as the result of an illegal search and seizure?
2. Assuming that the answer to the previous question is in the negative, must the Government return the petitioners' property (some \$500,200 cash) where no criminal charges are pending against anyone in connection with the possession of such property, such property is not involved as evidence in any criminal proceeding and the Government has asserted no claim (through forfeiture or other appropriate proceedings) to the property?

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. The Fifth Amendment provides:

"No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE*

On October 6, 1975, U. S. Magistrate Barbara Hackett issued a search warrant¹ for the search of the premises located at 18805 Capitol Street, Southfield, Michigan (a-25—a-26), the residence of petitioners and James Wingate (a-62).²

The search warrant was based upon an affidavit given by FBI agent Edward Grimsley which stated that the Wingate residence and twelve other locations had concealed upon them "bookkeeping records and wagering paraphernalia . . . which are in violation of Title 18, United States Code, Sections 2, 371 and 1955" (a-30). Additionally, Grimsley stated that he had probable cause to believe that James Wingate and twenty-two other individuals were engaged in illegal gambling operations (a-32—a-33). This belief, he said, "is based upon personal observations and participation in this investigation, as well as the receipt of information from confidential informants whose information has been corroborated by independent surveillances . . . and by information supplied by other confidential informants of the Federal Bureau of Investigation, as set out herein" (a-33). Insofar as it pertains to this case, Grimsley relied upon one informant ("FBI-1") who told Grimsley that James Wingate was one of the largest numbers operators in the Detroit area (a-34—a-36). Mention was also made in the affidavit of the use of "drop sites", "offices", "runners", etc., in connection with the operation of the particular type of gambling enterprise under investigation (a-35—a-36). The affidavit went on to discuss in great detail the gambling activity which was operated out of the twelve locations other than the Wingate residence (a-36—a-56). Next, it discussed, in general terms, the operation of the particular type of gambling enterprise Grimsley believed James Wingate headed (a-56—a-58). It then concluded that James Wingate (1) was the "banker" of the "major mutuels combine"

*Unless the context indicates otherwise, parenthetical references preceded by "a-" refer to the pages of the appendix to the brief submitted by the Petitioners to the Court of Appeals.

1. Hereinafter, this search warrant will sometimes be referred to as "S.W. #1".

2. James Wingate is, respectively, husband and father of Alzalia Wingate and Toni Wingate, the petitioners (a-17—a-18; a-62).

(a-58—a-59) and (2) "keeps large sums of money used to operate his combine at his residence . . . and in safety deposit boxes located at an unknown commercial bank" (a-59). The second conclusion, Grimsley said, was based on his experience and the experience of other FBI agents, his (Grimsley's) opinion "that a 'banker' would not utilize conventional depositories of money . . . [but] would prefer to keep large sums of money unreported for tax purposes", the fact that Wingate did "not maintain an office at any known location where he conducts a legitimate business and, so far as Grimsley knew, was not lawfully engaged in any trade, profession, etc., that Wingate owned three automobiles having "aggregate value of \$25,500" and that, although the Wingate residence "was purchased by [James Wingate] and his wife, Alzalia Wingate, for \$100,000.00, only \$50,000.00 of which was mortgaged" (a-59).³

During the course of the October 6 search of the Wingate residence, Federal agents seized cash in excess of \$3,000 and other items (a-26—a-29; a-17). Grimsley, on the following day, applied for and received a second search warrant ("S.W. #2") granting authority to search "safety deposit box, #127" of the Livernois-Lyndon Branch of the Manufacturers National Bank of Detroit, Michigan (a-12—a-18). As the Court of Appeals indicated, the first two numbered paragraphs of the supporting affidavit were identical to the opening paragraph of the October 6 affidavit for S.W. #1. The October 7 affidavit then concluded:

"3. * * * During the course of [the October 6, 1975, search of the Wingate residence], JAMES WINGATE who was present remarked to the investigating agents in substance that he did not keep gambling paraphernalia or gambling receipts at his residence; that he did have a safety deposit box, but that he did not keep the key on

3. The affidavit contains nothing to substantiate Grimsley's claim that evidence of James Wingate's alleged criminal activity would be found at the Wingate residence apart from the assertions Grimsley made in support of his second conclusion. Two points may be noted with respect to these assertions. First, the most prominent of the assertions consist of several negative propositions. But it does not follow from the fact that James Wingate did not do certain things that he did do other things at his residence (or anyplace else). Second, and of greater importance, as noted in the "Original Motion" (see n. 4, *infra*), petitioner Alzalia Wingate operated a rather substantial business enterprise from her residence. (Original Motion, Pars. 6.B and 16.)

the premises at 18805 Capitol Street; he stated that the safety deposit box was at MANUFACTURERS BANK—he did not disclose the location.

"Subsequently, the investigating agents found in the residence at 18805 Capitol Street, a receipt for payment for a safety deposit box, #110 at MANUFACTURERS NATIONAL BANK OF DETROIT, Livernois-Lyndon Branch, Detroit, Michigan.

"This Agent has learned that #110 was closed on March 18, 1974, but that a new and larger box, #127, was opened on March 19, 1974, in the names of ALZALIA WINGATE, wife of JAMES WINGATE, and TONI WINGATE, daughter of JAMES WINGATE.

"I, therefore, have reason to believe that from statements made by JAMES WINGATE during the course of the search at his residence at 18805 Capitol Street, that gambling receipts and gambling records are contained in a safety deposit box, #127, located at the MANUFACTURERS NATIONAL BANK, Livernois-Lyndon Branch, Detroit, Michigan. In addition, an effort was made to locate any other safety deposit box held by MANUFACTURERS NATIONAL BANK on behalf of JAMES WINGATE. No other safety deposit boxes appear to be held by JAMES WINGATE" (a-17—a-18).⁴

4. Petitioners' present counsel, on November 4, 1975, filed a "Motion of Alzalia Wingate for Return of Property Illegally Seized" (hereinafter, "Original Motion"). In it, the claims were made that the October 7, 1975, affidavit was, in part, "intentionally incomplete so as to deceive the Magistrate" and also, in other parts, "totally false, misleading and fabricated" (Paragraphs 4, 6, 15.C and 16). Before the hearing could occur, new counsel came into the case and filed a document entitled "Superseding Motion of Alzalia Wingate and Toni Wingate to Vacate the Search Warrant and Return Property Pursuant to Rule 41(e), Federal Rules of Criminal Procedure" (hereinafter, "Superseding Motion") (a-1—a-3). The Superseding Motion, which was explicitly "intended to replace any and all other motions with respect to this specific subject matter" (a-1), contained no charges of misrepresentation or omission of material facts by Grimsley and apparently, at the hearing, petitioners' new counsel stated that he did not challenge the veracity of the affidavits. (Court of Appeals Slip Opinion, pages 7-8.)

As indicated in the Original Motion (Par.4), although apparently not in the Superseding Motion, Safe Deposit Box #110 had been opened in the name of Petitioner Alzalia Wingate; her husband's name was nowhere on it. Interestingly, Grimsley's October 7th affidavit omitted to specify the owner or lessee of Safe Deposit Box #110.

After the search of the safe deposit box, Grimsley again applied for a warrant ("S.W. #3") to search the Wingate residence. As a result of that search, some \$3,600 cash was seized by the Federal government.

None of the monies seized have ever been returned. No criminal charges were ever filed against petitioners. Indeed, it appears that they "have never been convicted of any crime or engaged in any criminal activity" (a-1—a-3 [Paragraph 3]). Indeed, in his affidavits for S.W. #1 and S.W. #2, Grimsley never accused petitioners of engaging in any of the activities he was investigating.

Although charges were filed against James Wingate, they were all dismissed on December 18, 1975. (*United States v James Wingate*, U. S. District Court, E.D. Mich., So. Div., Crim. No. 75-81740.)

The United States has not instituted forfeiture proceedings with respect to any of the items seized during the course of the three searches.

The Government has refused to return to petitioners the cash it seized from them.

The Superseding Motion was filed, pursuant to Federal Rule of Civil Procedure 41(e), to obtain return of the \$500,200 cash seized from Safe Deposit Box #127 during the course of the second search. As previously indicated, the motion was denied on January 16, 1976, the Court of Appeals affirmed on June 16, 1976, and it denied rehearing on July 22, 1976.

REASONS FOR GRANTING THE WRIT

The ruling of the court below on the Fourth Amendment argument is in conflict with the applicable decisions of both this court and the various courts of appeals. The ruling on the Fifth

Amendment argument⁵ is in direct conflict with that amendment.

1. A search warrant may be issued only upon a showing of probable cause to believe that the criminal objects described in the warrant are presently in the place whose search is authorized. *Spinelli v United States*, 393 U.S. 410 (1969), and *Aguilar v Texas*, 378 U.S. 108 (1964). The District Court appears to have believed that the October 7 affidavit, by itself, could not justify the search warrant for Safe Deposit Box #127 but assumed that the Magistrate, in issuing the search warrant for that safe deposit box, also considered the affidavit submitted to her on the previous day for the warrant authorizing the search of the Wingate residence and that, taken together, the two affidavits established probable cause. The Court of Appeals, upon the authority of its prior decisions in *United States v Nolan*, 413 F.2d 850 (C.A. 6, 1969),⁶ and *DiPiazza v United States*, 415 F.2d 99 (C.A. 6, 1969), held that this approach to the issue was consistent with the Fourth Amendment and affirmed. Petitioners, on the other hand, contend that, either singularly or collectively, the two affidavits did not establish probable cause to justify a search warrant for Safe Deposit Box #127 and they respectfully submit that the courts below erred in holding the contrary.

5. While the Superseding Motion was pending in the District Court, all criminal charges against James Wingate were dismissed. No proceeding involving the \$500,200 cash is pending in any court. The Government has not claimed, through forfeiture or other proceedings, that it is entitled to any portion of that money. Nevertheless, counsel who then represented petitioners apparently never directly raised the Fifth Amendment issue in either the District Court or in the Court of Appeals. It was, however, raised by petitioners' present counsel in the petition for rehearing which he submitted to the Court of Appeals. That court, in its order denying rehearing, stated that the issue "had been considered fully at the original submission of this appeal."

6. In *Nolan*, the Sixth Circuit had held that when one of two contemporaneously filed affidavits is attached, one having been given for a warrant to search a defendant's residence and the second for a warrant to search his automobile, the evidence supplied by the other can be considered as support for the Commissioner's finding of probable cause for the warrant under attack. In *Nolan*, it should be noted, unlike the situation in the instant case, both affidavits were submitted to, and considered by, the Commissioner at the same time.

As previously indicated, the October 6 search warrant was based on an affidavit requesting a warrant not only for the Wingate residence but for also twelve other locations. However, unlike the situation with respect to the Wingate residence, the affidavit contained a plethora of facts to justify the belief that there was evidence of gambling activity at the other locations (a-36—a-56). However, insofar as it pertained to the Wingate residence, the affidavit actually contained nothing other than the flat assertion that the Wingate residence contained evidence, etc., of gambling activity, such assertion being exclusively based upon the fact that Wingate was (allegedly) the banker for a numbers operation (a-58—a-59). This is hardly enough to establish probable cause. *Spinelli v United States*, *supra*, *United States v Ventresca*, 380 U.S. 102 (1965), *Aguilar v Texas*, *supra*, 378 U.S. at 114-16, *Nathanson v United States*, 290 U.S. 41, 46-47 (1933), *United States v Cobb*, 432 F.2d 716, 718-719 (C.A. 4, 1970), *United States v Flanigan*, 423 F.2d 745, (C.A. 5, 1970), *Durham v United States*, 403 F.2d 190 (C.A. 9, 1968), and *United States v Donlon*, 334 F. Supp. 1272 (D. Del., 1971). And if the search of the Wingate residence was contrary to the Fourth Amendment, evidence obtained as a result of information obtained during that illegal search (i.e., the information pertaining to the two safe deposit boxes) must be suppressed and the property returned.

But even if the contents of the October 6 affidavit constituted probable cause to search the Wingate residence, there still is no basis for concluding that petitioners' safe deposit boxes had evidence, etc., of any illegal activity. Safe Deposit Box #110 was issued in the name of petitioner Alzalia Wingate.⁷ Safe Deposit Box #127 was issued in the name of both petitioners (a-17—a-18). No claim was ever made that James Wingate had access to either box. Nothing in either the October 6 or the October 7 affidavits remotely link either petitioner to any illegal activity whatsoever. The fact that, over one year prior to execution of the affidavits, Safe Deposit Box #110 had been closed by one of the petitioners and Safe Deposit Box #127 had

7. See n. 4, *supra*.

been opened in the name of both of the petitioners (a-17—a-18) hardly justifies any conclusion which could support issuance of the search warrant for Safe Deposit Box #127.

To conclude, the fact that there was probable cause to believe that James Wingate headed a numbers operation by itself hardly constituted the cause necessary to justify a search of the Wingate residence. It constituted even less cause to justify the search of a safe deposit box owned or leased by others.

2. The government has never made any claim, through any appropriate proceeding, to the \$500,200. No criminal case is pending involving the money. The Government's refusal to return petitioners' lawful property is a violation of their Fifth Amendment rights to due process of law and not to have their property taken for public use without just compensation. "[I]t is fundamental to the integrity of the criminal justice process that property involved in the proceeding, against which no Government claim lies, be returned promptly to its rightful owner." *United States v Wilson*, ___ F.2d ___ (C.A. D.C., No. 75-1713, June 28, 1976),⁸ Slip Opinion at 6. "[T]he district court, once its need for the property has terminated, has both the jurisdiction and the duty to return the contested property here regardless and independently of the validity or invalidity of the underlying search and seizure." *United States v Wilson*, *supra*, Slip Opinion at 7. And a Rule 41(e) motion is an appropriate vehicle to seek return of property under such circumstances even though there may be other adequate civil remedies. *United States v Wilson*, *supra*. Requiring petitioners' to resort to other civil remedies would merely result in a waste of time, money and judicial resources and would hardly serve any policy consideration.

8. A digest of the opinion appears at 19 Criminal Law Reporter 2349-50.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 20, 1976.

ADDENDUM (August 30, 1976): After this petition was sent to the printer, counsel for petitioners (who does not represent them in tax matters) was apprised of certain information not previously known to him. The substance of this information (which may have the effect of modifying some of the statements contained in the petition) is as follows: On November 11, 1975, the Internal Revenue Service levied on property, monies, etc., in the possession of the Federal Bureau of Investigation and belonging to either James Wingate or petitioner Alzalia Wingate. The amount of the James Wingate levy was \$385,185.40. The amount of the Alzalia Wingate levy was \$464,367.75. Counsel has also been advised that the underlying jeopardy assessments are being challenged by the attorneys who handle the Wingates' tax matters.

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

MANUFACTURERS NATIONAL
BANK OF DETROIT,
Livernois-Lyndon Streets,
Safety Deposit Box #127,
Detroit, Michigan,
Defendants.

CRIMINAL
NO. 75-81745

MEMORANDUM OPINION

Alzalia Wingate and Toni Wingate, by a superseding motion, seek the return of the contents of a safety deposit box, which contents were seized upon the authority of a search warrant.

On October 6, 1975, United States Magistrate Barbara K. Hackett issued several search warrants, including a search warrant for the premises at 18805 Capitol Street, Southfield, Michigan, being the residence of James Wingate. The affidavit of Special Agent Edward Grimsley, Federal Bureau of Investigation, in support of the October 6, 1975 search warrant contains great detail and is clearly sufficient for a determination of probable cause to believe that James Wingate and others have committed and were continuing to commit multiple offenses, including illegal gambling operations in violation of Sections 750.301, 750.304, 750.306, 750.314, and 750.315 of the Michigan Compiled Laws, and that they had conspired to do so in violation of Sections 1955 and 371 of Title 18, United States Code.

On October 6, 1975, upon the authority of the search warrant, agents of the Federal Bureau of Investigation searched the premises at 18805 Capitol Street, Southfield, Michigan, during the course of which they interviewed James Wingate.

On October 7, 1975, another affidavit of Special Agent Grimsley was submitted to the same United States Magistrate, whereupon she issued a search warrant authorizing the search of safety deposit box No. 127 located at the Livernois-Lyndon Streets Branch of Manufacturers National Bank of Detroit and rented in the name of Alzalia Wingate and Toni Wingate, wife and daughter of James Wingate. The search warrant recited that said safety deposit box was being used to conceal illegally obtained gambling records and gambling receipts.

On the authority of the October 7, 1975 search warrant, special agents of the Federal Bureau of Investigation opened the box and took possession of currency in the sum of \$500,200.00.

In their superseding motion dated November 20, 1975, Alzalia Wingate and Toni Wingate allege that they are the owners of the currency removed from the safety deposit box. The validity of the search warrant is the only issue raised by the motion. The Court makes no determination with respect to the ownership of the contents of the box.¹

It is clear that the purpose of issuance of the search warrant was to obtain gambling records and gambling receipts belonging to and/or in the control of James Wingate. The warrant was not issued to obtain evidence against Alzalia Wingate or Toni Wingate.

The Court has difficulty with the sufficiency of the allegations in paragraph 2 of the October 7, 1975 affidavit. Paragraph 2 states nothing more than conclusions based upon personal participation in an investigation. The allegations and conclusions stated in paragraph 2 of the affidavit are more than

1. The affidavit in support of the motion is signed by counsel for the moving party. The allegations in paragraph 3 are not on information and belief. It is not clear how the affiant could know that others have never engaged in any criminal activity, nor how they could know who owns the money found in the box. It is perhaps reasonable to infer that these allegations were intended to be upon information and belief.

adequately supported by the detailed allegations in the affidavit of Special Agent Edward Grimsley filed on the previous day with the same magistrate and which supported the issuance of the October 6, 1975 search warrant with respect to the residence of James Wingate.

MAY THIS COURT CONSIDER THE CONTENTS OF THE OCTOBER 6 AFFIDAVIT IN DETERMINING THE VALIDITY OF THE OCTOBER 7 SEARCH WARRANT?

It is established law that in passing on the validity of a search warrant, the reviewing court may consider only information brought to the magistrate's attention. *Aguilar v. Texas*, 378 U.S. 108 (1964). Also see Vol. 68, Am.Jur.2d, Searches and Seizures, §63; and Rule 41, Federal Rules of Criminal Procedure. With equal reason, the reviewing court must consider all information properly considered by the issuing magistrate.

While the inadequacy of the lone affidavit does not establish that she relied upon more, such inadequacy is consistent with such a conclusion, if otherwise supported by the record. So, too, is the printed form of search warrant which refers to "Affidavit(s)". (Emphasis added).

The affidavit of October 7 contains no specific cross reference to the October 6 affidavit, but in paragraph 3 it does contain a cross reference to the October 6 search warrant.

The opening paragraphs of both affidavits are the same.

Both affidavits were made by the same affiant. They were filed with the same magistrate within a two-day period in connection with one on-going major investigation.

Not only may it be inferred that the magistrate considered information derived from both affidavits in issuing the October 7 warrant; the more carefully one examines the entire file, the more certain it is that no other conclusion is consistent with reality.

READING THE TWO AFFIDAVITS IN SERIES, AS DID THE MAGISTRATE, DO THEY SUPPORT THE CONCLUSION THAT THERE WAS PROBABLE CAUSE TO BELIEVE THAT BOX 127 CONTAINED THE DESCRIBED CONTRABAND?

The October 6 affidavit not only described the large scope of James Wingate's illegal gambling operation; it also establishes the great care he has used to escape detection.

The October 7, 1975 affidavit for search warrant was typewritten. Above the affiant's signature additional sentences were printed. From the context the Court is satisfied that the additional sentences read as follows:

"In addition *an* effort was made to locate any other safety deposit box held by Manufacturer National Bank on behalf of James Wingate. No other safety deposit boxes appear to be held by James Wingate." (Emphasis added).²

The second affidavit disclosed admissions by James Wingate that he did not keep gambling contraband at his home and that he did have or had had a safety deposit box. It also indicates that the investigating agents found at the Wingates' residence a receipt for payment for a safety deposit box, #110, at Manufacturers National Bank of Detroit. Finding the receipt led directly to the location of a currently leased box in the name of his wife and daughter. The box was not the smallest box available from the bank. It is reasonable to infer from all the circumstances disclosed by the affidavits that James Wingate had access to and used box #127 for illegal purposes although it was leased in the name of others. The Court has been unable to find any authority that a safety deposit box is immune from search because it is leased in another's name.

For the foregoing reasons, the motion of Alzalia Wingate and Toni Wingate to vacate the search warrant and to order return of the contents of safety deposit box #127 to them should be denied.

/s/ JAMES P. CHURCHILL
United States District Judge

A TRUE COPY

HENRY R. HANSSEN
Clerk

By: /s/ LILLIAN BROOKS
Deputy Clerk

Dated: January 16, 1976

2. The printed word itself could be read as "an" or "no".

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

MANUFACTURERS NATIONAL BANK
OF DETROIT,
Livernois-Lyndon Streets,
Safety Deposit Box #127,
Detroit, Michigan,

Defendant.

CRIMINAL
NO. 75-81745

ORDER DENYING MOTION
TO VACATE SEARCH WARRANT
AND RETURN CONTENTS

At a session of said court held in the Federal Building and U. S. Courthouse, Detroit, Michigan, on January 16, 1976.

Present: HONORABLE JAMES P. CHURCHILL
United States District Judge

For the reasons set forth in a Memorandum Opinion of the Court issued this date, the Superseding Motion of Alzalia Wingate and Toni Wingate to Vacate the Search Warrant and Return Property Pursuant to Rule 41(e), Federal Rules of Criminal Procedure, is hereby DENIED.

/s/ JAMES P. CHURCHILL
United States District Judge

A TRUE COPY

HENRY R. HANSSEN
Clerk

By: /s/ LILLIAN BROOKS
Deputy Clerk

NO. 76-1296
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff,

v.

MANUFACTURERS NATIONAL BANK
OF DETROIT, LIVERNOIS-
LYNDON STREETS,
SAFETY DEPOSIT BOX #127,
DETROIT, MICHIGAN,
Defendants.

IN RE: PETITION OF ALZALIA
WINGATE
AND TONI WINGATE,
Petitioners-Appellants,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee,

APPEAL from the
United States
District Court for
the Eastern District
of Michigan,

Southern Division.

Decided and Filed June 16, 1976.

Before: **CELEBREZZE, MILLER*** and **LIVELY**, Circuit Judges.

LIVELY, Circuit Judge. The issues in this case arose out of two searches conducted pursuant to separate search warrants issued by a federal magistrate. On October 6, 1975 an F.B.I. agent filed with the magistrate an extensive affidavit based on an eighteen month long "investigation of an organized illegal gambling business operating . . ." in Detroit. The affidavit

*The Honorable William E. Miller died on April 12, 1976 and did not participate in this opinion.

identified a number of persons as participants in the illegal activities, including James Wingate who was described as the "banker" for a numbers operation handling approximately \$25,000 per day in bets. The affidavit contained a detailed description of the numbers operation in the Detroit area, based on "personal observations and participation in this investigation, as well as receipt of information from confidential informants whose information has been corroborated by independent surveillances conducted by the Federal Bureau of Investigation and by information supplied by other confidential informants"

The affidavit identified by street number thirteen separate buildings or residences in the Detroit area where it was believed evidence relating to illegal gambling would be found. Each location was connected to specific information received from a particular informant whose past reliability was vouched for. Among the residences identified in the affidavit was that of James W. Wingate at 18805 Capitol, Southfield, Michigan. The thirteen requested search warrants were issued and the Capitol Street residence was searched on October 6th.

On October 7, 1975 the same F.B.I. agent who had filed the October 6th affidavit filed a second one with the magistrate who had issued the October 6th warrants. The first two numbered paragraphs were identical to the corresponding opening paragraphs of the October 6th affidavit. The October 7th affidavit then concluded as follows:

3. That pursuant to the execution of a search warrant authorized by the Honorable Barbara Hackett on October 6, 1975, the residence of **JAMES WINGATE**, located at 18805 Capitol Street, was searched by Agents of the Federal Bureau of Investigation. Approximately Three-Thousand Dollars (\$3,000.00) in currency was located in the residence of 18805 Capitol Street. During the course of that search, **JAMES WINGATE** who was present remarked to the investigating agents in substance that he did not keep gambling paraphernalia or gambling receipts at his residence; that he did have a safety deposit box, but that he did not keep the key on the premises at 18805 Capitol Street; he stated that the safety deposit box was at **MANUFACTURERS BANK**—he did not disclose the location.

Subsequently, the investigating agents found in the residence at 18805 Capitol Street, a receipt for payment for a safety deposit box, #110 at MANUFACTURERS NATIONAL BANK OF DETROIT, Livernois-Lyndon Branch, Detroit, Michigan.

This Agent has learned that box #110 was closed on March 18, 1974, but that a new and larger box, number #127, was opened on March 19, 1974, in the names of AZALIA WINGATE, wife of JAMES WINGATE, and TONI WINGATE, daughter of JAMES WINGATE.

I, therefore, have reason to believe that from statements made by JAMES WINGATE during the course of the search at his residence at 18805 Capitol Street, that gambling receipts and gambling records are contained in a safety deposit box, #127, located at the MANUFACTURERS NATIONAL BANK OF DETROIT, Livernois-Lyndon Branch, Detroit, Michigan. In addition an effort was made to locate any other safety deposit box held by Manufacturer National Bank on behalf of James Wingate. No other safety deposit boxes appear to be held by James Wingate.

/s/ EDWARD GRIMSLEY
EDWARD GRIMSLEY
Special Agent/Federal Bureau
of Investigation

A search warrant was issued for safety deposit box #127, and the search yielded \$500,200.00 in currency. A motion was made by Alzalia Wingate and Toni Wingate pursuant to Rule 41(e), Fed. R. Crim. P., for return of the property seized from the lock box. This appeal is from an order of the district court denying this motion. The appellants argue that the October 6th affidavit was not sufficient to establish probable cause to search the Wingate residence. They maintain that the search of the residence was illegal and that all information pertaining to the safety deposit boxes was derived from this search and should be suppressed as "fruit of the poisonous tree." They further contend that even if the October 6th search was lawful the October 7th affidavit was not sufficient to establish probable cause for the search of box #127, and that the magistrate was not permitted to rely on the October 6th affidavit to cure

deficiencies in the October 7th affidavit in finding probable cause for a search of box #127.

We have carefully considered the October 6th affidavit. To the extent that the information contained in it was not based upon personal observations and experience of the affiant or surveillance by other F.B.I. personnel it was derived from statements of unnamed informants. The affidavit recited past experiences with all the informants in which their information had proven reliable, corroboration of their statements about the Detroit numbers operation by F.B.I. surveillance and the fact that each informant was deeply involved personally in numbers betting. In addition, the affidavit set forth conversations between several of the informants and James Wingate as the source of some of the information. The affidavit described many details of the "James Wingate Mutuels Combine."

The October 6th affidavit satisfied the two-pronged test of *Aguilar v. Texas*, 378 U.S. 108 (1964), for crediting hearsay information from unnamed informants in determining whether probable cause for issuance of a search warrant has been established. The affidavit contained a sufficient statement of "some of the underlying circumstances from which the informant concluded . . ." that illegal numbers gambling was being carried on and that money used in the operations would be found at the Wingate residence as well as some of the underlying circumstances from which the affiant had concluded that the informants were "credible" or their information was "reliable." *Id.* at 114. *See Naples v. Maxwell*, 393 F.2d 615 (6th Cir. 1968), *cert. denied*, 393 U.S. 1080 (1969). Appellants complain that the affidavit contained no statement that the affiant, or anyone else, had actually seen money being taken into the Wingate residence or had viewed money there. Their reliance on *Spinelli v. United States*, 393 U.S. 410 (1969), and *Nathanson v. United States*, 290 U.S. 41 (1933), is misplaced. The October 6th affidavit did not contain a recital of activities which "contain no suggestion of criminal conduct when taken by themselves . . ." which the affiant sought to convert into evidence of a crime on mere suspicion. *Spinelli, supra*, 393 U.S. at 418. Nor did the affidavit contain the "[m]ere affirmation of suspicion or belief . . ." of the affiant. *Nathanson, supra*, 290 U.S. at 47.

The October 6th affidavit was sufficient to establish probable cause to believe that illegal gambling activities which are a federal offense under 18 U.S.C. § 1955 were being carried on, *United States v. Williams*, 459 F.2d 909 (6th Cir. 1972); and that evidence of these activities would be found on the premises at 18805 Capitol. As we wrote in *United States v. Eisner*, 297 F.2d 595, 597 (6th Cir.), *cert. denied*, 369 U.S. 859 (1962), "In determining what is probable cause, the Commissioner is not called upon to determine whether the offense charged has in fact been committed." The magistrate to whom an application for a search warrant is presented must apply common sense standards, *United States v. Ventresca*, 380 U.S. 102, 108 (1965); and when a determination of probable cause has been made, it is entitled to great deference by reviewing courts. *Spinelli v. United States*, *supra*, 393 U.S. at 419; *United States v. Shropshire*, 498 F.2d 137, 142 (6th Cir. 1974), *petition for cert. dismissed*, 420 U.S. 901 (1975).

The October 7th affidavit did not contain the detailed information concerning the Detroit numbers operations which was set forth in the affidavit of the previous day. After repeating the opening paragraphs of the earlier affidavit verbatim, it was limited to a statement of the results of the search of the Wingate residence and the assertion that the evidence gained in this search established probable cause for a search of safety deposit box #127. The magistrate was entitled to consider the October 6th affidavit in conjunction with the one presented the following day in determining whether probable cause had been established for a search of the bank box of appellants. Both affidavits referred to the same eighteen-month investigation and the alleged complicity of James Wingate in the Detroit numbers operations. The second affidavit referred specifically to the search warrant which the magistrate had issued the previous day. This issue is controlled by our decisions in *United States v. Nolan*, 413 F.2d 850 (6th Cir. 1969), and *DiPiazza v. United States*, 415 F.2d 99 (6th Cir. 1969), *cert. denied*, 402 U.S. 949 (1971).

In *Nolan* separate affidavits were presented to a magistrate by an officer seeking warrants to search the automobile and the living quarters of a suspect. It was claimed that the affidavit with respect to the automobile was deficient. The court wrote—

We believe that consistent with the Fourth Amendment the facts supplied the Commissioner by both affidavits could be taken into account by him in determining probable cause in relation to each. 413 F.2d at 853.

It would needlessly restrict the discretion of a magistrate to hold that two affidavits filed so close in time and referring to a single criminal investigation which was still continuing could not be considered together in determining whether to authorize a further search. We do not believe that *United States v. Acosta*, 501 F.2d 1330 (5th Cir. 1974), *cert. denied*, 423 U.S. 891 (1975), leads to a different conclusion. There the magistrate relied on his own information, not on statements contained in a written affidavit. The court stated,

... we believe the weight of authority clearly is that any information relied upon by a federal magistrate in determining whether probable cause exists must be made a part of the affidavit or affidavits supporting the warrant. 501 F.2d at 1334. (emphasis added).

When read together the two affidavits provided the basis for a reasonable inference that evidence pertaining to the Detroit numbers operations would be found in box #127. A magistrate may draw "the usual inferences which reasonable men draw from evidence." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

Appellants argue that as "... innocent and uninvolved third parties, [they] were deprived of their Fourth and Fifth Amendment rights due to failure of the government to utilize a subpoena *duces tecum* or demonstrate its impracticality before applying for a warrant to search safe deposit box #127." Once it is established that probable cause exists to believe a federal crime has been committed a warrant may issue for the search of any property which the magistrate has probable cause to believe may be the place of concealment of evidence of the crime. The necessity that there be findings of probable cause as to two factors—the commission of a crime and the location of evidence—affords protection from unreasonable searches and seizures, which are the only ones forbidden by the Fourth Amendment. We are not persuaded that the contrary rule adopted by the district court in *Stanford Daily v. Zurcher*, 353

F.Supp. 124 (N.D. Calif. 1972), is required by either the Fourth or Fifth Amendments or the Federal Rules of Criminal Procedure.

The final ground for reversal which the appellants have argued in this court charges misrepresentation or omission of material facts by agent Grimsley in the October 7th affidavit. This issue was not presented to the district court for a ruling. In fact, at the hearing on their Rule 41 motion counsel for appellants stated that he did not challenge "the veracity of the statement"—referring to the identical material which is now claimed to be either a misrepresentation or an incomplete account of the agent's conversation with James Wingate during the October 6th search. This issue is not properly before the court, and we will not consider it. *Gibson v. First Federal Savings & Loan Association of Detroit*, 504 F.2d 826 (6th Cir. 1974); *Wiper v. Great Lakes Engineering Works*, 340 F.2d 727 (6th Cir.), cert. denied, 382 U.S. 812 (1965).

The judgment of the district court is affirmed.

NO. 76-1296

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff

v.

MANUFACTURERS NATIONAL
BANK OF DETROIT,
LIVERNOIS-LYNDON STREETS,
SAFETY DEPOSIT BOX #127,
DETROIT, MICHIGAN

Defendants

IN RE: PETITION OF ALZALIA
WINGATE
AND TONI WINGATE

Petitioners-Appellants

v.

UNITED STATES OF AMERICA
Respondent-Appellee

ORDER

BEFORE: PHILLIPS, Chief Judge; CELEBREZZE and
LIVELY, Circuit Judges.

Upon consideration of the petition for rehearing filed herein, the court concludes that the issues raised therein were considered fully at the original submission of this appeal and that no reason for rehearing has been demonstrated.

The petition for rehearing is denied.

ENTERED BY ORDER OF
THE COURT

John P. Hehman, Clerk

By /s/ GRACE KELLER
Grace Keller,
Chief Deputy